84-651

No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRISTOL-MYERS COMPANY,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Court of Appeals reviews an Order of the Federal Trade Commission ("FTC") that restrains commercial speech protected by the First Amendment, is that Court required to exercise independent judgment and make an independent determination concerning the FTC's findings of fact to ensure that the restraint does not violate the First Amendment? This part of the petition challenges the constitutionality of that portion of the Federal Trade Commission Act, 15 U.S.C. § 45(c), which provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

2. Does the FTC's "prior substantiation doctrine" violate the First Amendment in that it allows the FTC to prohibit commercial speech (i) without proof of deception and (ii) without proof that the restraint imposed is the least restrictive alternative available?

3. Is a respondent in an FTC proceeding deprived of its due process right to fair notice of the issues to be litigated against it where the basis of a cease and desist order is neither alleged in the complaint nor addressed at the administrative hearing?

PARTIES TO THE PROCEEDING

Bristol-Myers and its advertising agencies (Ted Bates Company, Inc. and Young & Rubicam, Inc.) were parties to the administrative proceeding below but only Bristol-Myers sought a review of the FTC's Order in the Court of Appeals and is the only party herein.

Pursuant to Supreme Court Rule 28.1, Bristol-Myers states that it has no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates other than the partially-owned subsidiaries listed below:

P. T. Bristol-Myers Indonesia (Indonesia)
Bristol Laboratories (Philippines) Inc. (Philippines)
Bristol-Myers (Taiwan) Limited (Taiwan)
Clairol (Taiwan) Ltd. (Taiwan)
Bristol-Myers Ecuatoriana, S.A. (Ecuador)
Farquimica Andina S.A. (Peru)
Bristol Farmaceutica Portugesa Lda. (Portugal)
Bristol Hellas A.E.B.E. (Greece)
Mead Johnson E.P.E. (Greece)
Bristol Iran Private Company Limited (Iran)
Bristol-Myers Boliviana Ltda.
Bristamalg Ltd. (Canada)
Bristol-Myers Lion Ltd. (Japan)
Bristol-Myers (Manila) Inc. (Philippines)
Bristol-Myers Middle East S.A.L. (Lebanon)
Boryung Bristol, Ltd. (Korea)
Bristol-Myers Peruana S.A. (Peru)
Bristol-Myers Products S.A. (Switzerland)
Bristol-Myers S.A. (France)
Laboratoires Allard S.A. (France)
Bristol-Myers Service Ltd. (Bermuda)
Bristol Research Institute of Taiwan Ltd. (Taiwan)
Dalton Holdings Ltd. (Cayman Islands, B.W.I.)
Grove Insurance Company Ltd. (Bermuda)
Mead Johnson S.A. (France)
Intrafin S.A. (Switzerland)
Bristol-Myers (Mid-East) S.A. (Switzerland)
Instituto Bio-Medico S.A. de C.V. (Mexico)
Servicios Bio-Medicos de Compresion,
S.A. de C.V. (Mexico)
Dom Bosco Agricola E Pecuaria Ltda. (Brazil)
Zimbra Industria E Comercio Ltda. (Brazil)
Mead Johnson De Chile Ltda.
Mead Johnson Philippines Inc. (Philippines)
2309 Realty Corporation (Philippines)
Palomar Pictures International, Ltd. (Canada)
Bristol-Myers S.A. (Switzerland)
Inter-Unitek A.G. (Switzerland)

Westwood Products, S.A. (Switzerland)
Laboratoires Bristol S.A. (France)
Union Technique Industrielle S.A. (France)
Zimmer S.A. (France)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Bristol-Myers Company and all of its wholly-owned subsidiaries ("Bristol-Myers") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed and enforced an order issued by respondent the Federal Trade Commission ("FTC").

OPINIONS BELOW

The Second Circuit's Opinion in *Bristol-Myers Company v. Federal Trade Commission*, No. 83-4167 (2d Cir. June 25, 1984), is set forth in the Appendix at 1a-26a and is reported at 738 F.2d 554. A petition for rehearing was denied by the Court of Appeals on July 26, 1984 (27a). The Opinion and Order entered by the FTC on July 5, 1983 is found at 28a-137a, the FTC's Order of October 14, 1983 denying reconsideration at 138a-144a and the Initial Decision of the Administrative Law Judge at 145a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1984, and rehearing was denied on July 26, 1984. This petition was filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fifth Amendments to the United States Constitution, which provide, respectively, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . .";

and

> "No person shall be . . . deprived of . . . property, without due process of law . . . ."

The statutory provision involved is Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which provides, in pertinent part:

> "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."
>
> . . . .
>
> "(c) . . . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

STATEMENT OF THE CASE

On February 23, 1973, the FTC commenced an administrative proceeding against Bristol-Myers and its advertising agencies challenging certain advertising for BUFFERIN,

EXCEDRIN and EXCEDRIN P.M., three over-the-counter internal analgesic products, as unfair and deceptive under Section 5 of the Federal Trade Commission Act (''FTC Act''). On September 28, 1979, the Administrative Law Judge (''ALJ'') entered a 268 page Initial Decision sustaining certain allegations in the complaint, and rejecting others. (145a *et seq.*). Both Bristol-Myers and the FTC appealed the Initial Decision to the Commission.

On July 5, 1983, the Commission issued a ''cease and desist'' order (''Final Order'') with an accompanying opinion (''FTC Opinion'') affirming portions of the ALJ's Initial Decision and rejecting others. (36a-137a). The FTC's Final Order contained four substantive sections, Parts I - IV (28a-35a), imposing restraints on all future advertising by Bristol-Myers of over-the-counter drug products or over-the-counter internal analgesics.

After a timely petition for reconsideration was denied by the FTC on October 14, 1983, Bristol-Myers sought review of the Final Order in the Court of Appeals. Among other issues raised, Bristol-Myers challenged the factual findings that served as a predicate for portions of Parts I and III of the Final Order. *See* 738 F.2d at 558-59, 563 (7a-8a, 16a-17a). In its decision, the Court of Appeals gave great deference to the FTC's findings and conclusions, rather than conducting an independent and searching review of the evidence and exercising independent judgment to determine whether the findings were justified. Bristol-Myers contends that the appellate court's failure to engage in this type of judicial review is inconsistent with this Court's recognition that commercial speech is protected by the First Amendment.

Bristol-Myers also challenged in the Court of Appeals the constitutionality of the FTC's prior substantiation doctrine[1],

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[1] Under this doctrine, the FTC prohibits commercial speech solely on the basis of its assumption that consumers expect advertisers to substantiate their product claims with evidence that constitutes a ''reasonable basis.''

pursuant to which the findings under Part II of the Final Order were made. Bristol-Myers pointed out that the prior substantiation doctrine was developed by the FTC in 1972, well before this Court reversed prior law and extended the protection of the First Amendment to commercial speech. This Court has never considered the very important question of whether the FTC's prior substantiation doctrine is inconsistent with the First Amendment.

Finally, Bristol-Myers demonstrated below that throughout the administrative hearing, the restraint which ultimately became Part III-A of the Final Order was predicated on an alleged violation that was later stricken by the FTC. The FTC nevertheless included this restraint in the Final Order on a basis totally different from those that had been alleged before in the proceeding. The Court of Appeals affirmed without discussion of this issue, in violation of Bristol-Myers's due process right to fair notice.

REASONS FOR GRANTING THE WRIT

I.

THE STATUTORY AND JUDICIAL REQUIREMENT THAT REVIEWING COURTS MUST DEFER TO FTC FINDINGS SHOULD BE REEVALUATED

This case presents the Court with an opportunity to resolve a direct conflict between the severely limiting statutory standard of judicial review set forth in the FTC Act and case law and the more recent First Amendment cases according constitutional protection to commercial speech.

In affirming the FTC's findings and Final Order, the Second Circuit applied the heretofore conventional standard of judicial review under which courts have given great deference to the FTC's findings and conclusions. *See, e.g.*, 738 F.2d at 562 (15a). This restricting standard of review is dictated by the FTC Act itself, enacted in 1914, which provides that on ap-

peal. "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). Cases such as *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), which accepted the narrow scope of judicial review of FTC findings, were decided at a time when commercial speech was deemed to be totally outside First Amendment protection. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942).

In 1976, however, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (hereinafter cited as "*Virginia Pharmacy*"), this Court recognized that advertising is entitled to First Amendment protection, observing:

> Our question is whether speech which does "no more than propose a commercial transaction,". . . is so removed from any "exposition of ideas,". . . and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government',". . . that it lacks all protection. Our answer is that it is not. . . . [W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment.

425 U.S. at 762 (citations omitted). Although subsequent cases have recognized distinctions between commercial and other forms of speech, the protected status of advertising is now a firmly-rooted First Amendment principle. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2879 (1983); *In re R.M.J.*, 455 U.S. 191, 199 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980) (hereinafter cited as "*Central Hudson*").

Since commercial speech is entitled to constitutional protection, it should certainly be entitled to the safeguards enunciated by this Court for the protection of other forms of protected speech. The Court has held that, where constitutional rights are restrained by an administrator, there must be strict

procedural safeguards, including close judicial scrutiny, to ensure that the decision is subject to adequate review. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965); *Blount v. Rizzi*, 400 U.S. 410, 418 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-560 (1975).

Such safeguards are necessary because the agency involved acts as both prosecutor and jury. As this Court recognized in *Freedman v. Maryland*, regarding the authority of a state censoring agent to regulate obscene films:

> Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court — part of an independent branch of government — to the constitutionally protected interests in free expression.

380 U.S. at 57-58 (footnote omitted). Thus in *Freedman* the burden of proof was placed upon the censor and he was required to initiate a prompt judicial review of the merits. *Id.* at 58.

In *Blount v. Rizzi*, the Court struck down provisions of the Postal Reorganization Act because they lacked the safeguards mandated by *Freedman*. Under the Act, the Postmaster General was empowered to halt use of the mails for commerce in allegedly obscene materials following administrative hearings. 400 U.S. at 411-12. The "fatal flaw" in the statute was that the distributor, rather than the Postmaster, was required to assume the burden of initiating judicial proceedings and persuading the appellate court that the materials were protected expression. *Id.* at 418. This Court concluded that "[t]he First Amendment demands that the Government must assume this burden." *Id. Cf. Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2882 n.20 ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.").

Furthermore, in *Blount*, the Court emphasized that only a judicial determination of the facts supporting the restraint was

sufficiently objective to validate a regulation of protected speech. 400 U.S. at 418-21, *citing Freedman v. Maryland*. *See also New York v. Ferber*, 458 U.S. 747, 774 n.28 (1982) (since petitioners did not dispute that their material was unprotected by the First Amendment, "no independent examination of the material [was] necessary to assure ourselves that the [administrator's] judgment here 'does not constitute a forbidden intrusion on the field of free expression.' "); *Central Hudson*, 447 U.S. at 566 (the Court was required to determine "whether the expression [electric utility advertisment] is protected by the First Amendment."). *Cf. Brookhart v. Janis*, 384 U.S. 1, 4 n.4 (1966) (right to cross-examination) ("When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record."); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (Court made "independent examination of the whole record" in determining that state court conviction for breach of the peace violated petitioners' First Amendment rights).

Recently, in *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984), the Court rejected, for libel cases governed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the "clearly erroneous" standard of judicial review set out in Rule 52(a) of the Federal Rules of Civil Procedure.[2] 104 S. Ct. at 1967. The Court held that appellate judges reviewing a decision by the district court in such cases must exercise "independent judgment" and determine whether the evidence before the district court established the key factor of "actual malice with convincing clarity." *Id.* Relying upon *New York Times Co. v. Sullivan*, the Court noted that:

> In cases where that line [between speech that may be unconditionally guaranteed and that which may legitimately

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[2] Rule 52(a) provides that the district court's findings of fact "shall not be set aside unless clearly erroneous . . . ."

> be regulated] must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'

104 S. Ct. at 1964 (citations omitted). It is submitted that where First Amendment rights are at stake an administrative agency should not be entitled to greater deference than the district court.

This Court has not yet directly addressed the role of the judiciary in guarding against overzealous agency restrictions of commercial speech. If, as Bristol-Myers contends, a searching judicial inquiry is mandated where, as here, a restriction on commercial speech is involved, the standards prohibiting such judicial review under the FTC Act are clearly unconstitutional. This conflict between the FTC Act and the First Amendment is an unresolved issue of great importance which this Court has never addressed, but should consider.[3]

II.

THE FTC'S PRIOR SUBSTANTIATION DOCTRINE VIOLATES THE FIRST AMENDMENT'S PROTECTION OF COMMERCIAL SPEECH

Part II of the Final Order was entered under the FTC's prior substantiation doctrine. FTC Opinion at 42a. This doctrine is based on the *theory* (never demonstrated to be true empiri-

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[3] The government will no doubt argue that First Amendment protections are inapplicable in this case since Bristol-Myers's speech was found deceptive by the FTC and, as the Court pointed out in *Virginia Pharmacy*, deceptive speech is not constitutionally protected. 425 U.S. at 771. This argument, which assumes the very question at issue (*i.e.*, whether the speech covered by the FTC's order was deceptive), should be rejected because it would be too simple a device for enabling the agency to nullify the constitutional safeguards.

cally) that all advertisements containing affirmative product claims make an implicit representation that the product claims are supported by a reasonable basis. Under this theory the FTC assumes that all consumers "expect" all advertisers to possess a "reasonable basis" to support their product claims. *E.g.*, FTC Opinion at 20a; *In re National Commission on Egg Nutrition*, 88 F.T.C. 174, 191 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

This Court has held as a general matter that commercial speech can be proscribed if it is false or deceptive, *Virginia Pharmacy*, 425 U.S. 748, 771 (1976), or if the restriction imposed (i) directly advances a substantial government interest, and (ii) this interest cannot be achieved by a more limited restriction. *Central Hudson*, 447 U.S. 557, 564-66 (1980).

The FTC's prior substantiation doctrine fails to satisfy either standard.

A. No Proof of Deception

Under the prior substantiation doctrine, the FTC prohibits commercial speech without making any factual findings that the particular advertising claims challenged in the proceeding *actually* deceived consumers or that consumers who saw the advertisements expected the challenged claims to be supported by a particular level of substantiation. Rather, the prior substantiation doctrine permits the FTC to *presume* that a claim is "*deceptive*" (and "*unfair*," as discussed below) without any proof of deception if the advertiser fails to satisfy the FTC's criteria for a "reasonable basis" for the claims. *E.g.*, *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

The FTC has recently acknowledged, however, that it does not have any *factual basis* for presuming that a claim is deceptive and consumers are deceived if an advertiser does not have a "reasonable basis." In March, 1983, the Commission announced a program to review its prior substantiation doctrine and specifically solicited from the public empirical evidence that might support its view of consumer expectations, *i.e.*,

"any consumer research or other evidence to support or refute [the] point [that consumers expect that advertisers have support for certain claims they make in advertising], including as much specific information as possible." Federal Trade Commission Advertising Substantiation Program; Requests for Comments, 48 Fed. Reg. 10,471, 10,473 (1983).

Thereafter, the FTC conceded that no evidence to support its view of consumer expectations had been submitted and that the Commission had none. *See* Federal Trade Commission Bureau of Consumer Protection, Advertising Substantiation Program: Analysis of Public Comments and Recommended Changes at 18-24, 60-61 (July 23, 1984). Indeed, the FTC recently commissioned two studies to collect data on consumer expectations. In so doing, the Commission Chairman conceded that: "At best this [lack of data] means we have no evidence that the predicate for the Commission's 10-year-old substantiation program has been in error. At worst, we see the debacle of a Federal agency engaged in a far-reaching, costly program with absolutely *no* evidence that the approach makes any sense." Remarks of James C. Miller III before the San Francisco Advertising Club at 6 (Sept. 30, 1983) (emphasis in original).

In short, in relying upon the prior substantiation doctrine the FTC bans commercial speech solely on the basis of an unproven assumption, a result, we submit, that cannot be countenanced under the First Amendment. *Cf. Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2882 n.20 (1983) (government bears burden of justifying restraint of commercial speech); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92 n.6 (1977) ("After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.' ").

B. Failure To Pursue The Least Restrictive Alternative

The FTC also attempts to justify the prior substantiation doctrine under its unfairness jurisdiction without making any attempt to pursue the least restrictive alternative available to it.

In *Central Hudson*, this Court devised a test which applies to the regulation of non-deceptive commercial speech. 447 U.S. at 564-66. Under that test, in order to restrain speech under an unfairness theory, the FTC is required to show that the method selected is the least restrictive alternative available to directly advance a substantial governmental interest. *Id.*[4] The FTC cannot show that it has complied. Clearly, the least restrictive alternative is for the FTC to determine, *on a case-by-case basis*, whether the challenged advertisements are actually unfair within the meaning of the FTC Act, as opposed to holding, as the FTC did here (*see* FTC Opinion at 37a, 81a n.65, 84a), that all advertisements which violate the prior substantiation doctrine are automatically "unfair."

A case-by-case approach would in no way inhibit the FTC's efforts to proscribe, in appropriate cases, commercial speech found by the FTC to be "unfair." The standards for such a determination have already been developed and promulgated. In 1980, after a comprehensive review of its "unfairness jurisdiction," the FTC concluded that an "unfair" act or practice had three essential elements: (i) substantial consumer injury; (ii) which outweighs countervailing benefits that the alleged unfair act or practice may produce, and (iii) harm which consumers could not reasonably have avoided. Policy Statement at 55,948. There is no reason why this three-prong test should not and cannot be applied in each case, thus safeguarding commercial speech from unwarranted interference.

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[4] *See* Federal Trade Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, Dec. 17, 1980, *reprinted in* [1969-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 ("Policy Statement") at 55,954-955 (FTC staff acknowledged that, in restraining commercial speech under the unfairness theory, the agency must act carefully to ensure that it complies with the test set forth in *Central Hudson*).

C. The Decision in the Court Of Appeals

The Court of Appeals accepted the FTC's argument that the FTC had made specific findings of deception or unfairness in this case. *See* 738 F.2d at 562 (15a). It failed, however, either in its opinion or its order denying reconsideration, to cite even one page of the FTC's opinion on which such findings allegedly appear, and we submit that no such findings were made by the FTC. In view of the foregoing, this Court should grant certiorari to determine the significant constitutional issue of whether the FTC's application of the prior substantiation doctrine violates the First Amendment.

III.

BRISTOL-MYERS WAS DEPRIVED OF ITS DUE PROCESS RIGHT TO FAIR NOTICE

Bristol-Myers is *not* challenging the well-established principle that the FTC may "fence-in" a violation of the Act with a broader order if the FTC deems it reasonably necessary to prevent the recurrence of similar violations. *See, e.g.*, FTC Opinion at 111a-112a; *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959). Bristol-Myers, however, is challenging the FTC's authority to impose a provision in a final order without providing fair notice prior to the commencement of the administrative hearing of the basis for entering the provision. Without such notice, the respondent has no opportunity to present arguments and evidence on the issue of whether the basis for the provision would be appropriate.

Prior notice of the type of remedy that may be imposed against the respondent in an administrative proceeding, and of its basis, was mandated by the Court in *In re Ruffalo*, 390 U.S. 544, 552 (1968). In *Ruffalo*, this Court reversed a disbarment order entered by the Ohio Supreme Court because the attorney had no notice that the challenged conduct, *i.e.*, hiring a railroadman to investigate cases involving his railroad employer, would be considered a disbarment offense until after

he and the investigator had testified. 390 U.S. at 546. Although the charges were amended prior to the Ohio court's decision, this Court held that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.* at 552. This Court stated:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

Id. at 551 (footnote omitted). Significantly, the Court refused to allow the due process violations to be "cured" by the amendment of the original charges, observing that:

> [S]erious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled "into a false sense of security". . . that he could rebut charges Nos. 4 and 5 by proof that Orlando was his investigator rather than a soliciter of clients. In that posture he had "no reason even to suspect". . . that in doing so he would be, by his own testimony, irrevocably assuring his disbarment under charges not yet made.

Id. at 551 n.4 (citations omitted). *See also Spiegel, Inc. v. FTC*, 540 F.2d 287, 296 (7th Cir. 1976) (" '[A]n order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.' ").

The Second Circuit reached a similar conclusion in *Jaffee & Co. v. SEC*, 446 F.2d 387 (2d Cir. 1971), a case overturning sanctions imposed by the SEC because of lack of notice to the respondent. In *Jaffee*, the court expressly rejected the argument that the mere potential for a broad order served as sufficient notice to comport with due process. It held that even though the possibility of derivative sanctions was "inherent in the facts of the case from the outset," the SEC's final action

violated Jaffee's right to due process because the suggestion that the SEC would actually pursue the sanctions was not raised until the conclusion of the hearing. 446 F.2d at 393.

These cases are directly applicable here. The complaint against Bristol-Myers had alleged that certain advertisements for EXCEDRIN P.M. had improperly represented that the product "contains a special sedative or sleep-inducing agent available only in EXCEDRIN P.M." Complaint ¶¶ 23, 24. The FTC, however, dismissed these allegations, finding that Bristol-Myers had not made the uniqueness representations. FTC Opinion at 100a-101a. It nevertheless included in the Final Order a provision prohibiting unsubstantiated special or unusual ingredient claims (Part III-A) and purported to justify this as fencing-in of other violations. 738 F.2d at 563 (16a); Opinion Denying Reconsideration at 143a-144a.

Bristol-Myers was totally misled as to whether a special ingredient provision was at issue. The complaint, the Initial Decision and the briefs filed before the Commission all demonstrate that throughout the proceedings, a cease and desist order of the type contained in Part III-A was proposed *solely* because of the allegation that EXCEDRIN P.M. contained a special sleep-inducing ingredient. *E.g.*, Complaint Counsel's Revised Answering Brief at 39 (April 4, 1980) (516a). As stated above, these allegations were dismissed. The "fencing-in" rationale, first enunciated by the FTC in its final Opinion — ten years after the proceeding was commenced — was obviously advanced far too late for Bristol-Myers to present arguments before the Commission on the appropriateness of the "fencing-in." *Cf. Jaffee & Co. v. SEC*, 446 F.2d at 394 ("Had Jaffee & Co. been afforded adequate notice, it would have had an opportunity, both to take action to lessen the attractiveness of invoking derivative sanctions and to introduce evidence before the hearing examiner tending to show that the use of such sanctions would not have been in the public interest. These opportunities were totally denied it by reason of the course adopted in the notice and at the Commission's hearings.").

This Court should grant certiorari to decide this serious due process issue.

CONCLUSION

For the reasons expressed above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: October 24, 1984

CERTIFICATE OF SERVICE

I, Kenneth A. Plevan, a member of the Bar of this Court and counsel for Petitioner herein, hereby certify that on this 23rd day of October, 1984, the "Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit" was served upon all parties required to be served by hand delivery of three copies of same to:

1) Office of the General Counsel
   Federal Trade Commission
   Washington, D.C. 20580

2) Solicitor General
   Department of Justice
   Washington, D.C. 20530

/s/ Kenneth A. Plevan

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